OUTER HOUSE, COURT OF SESSION

[2019] CSOH 30

A218/17

OPINION OF LADY CARMICHAEL

In the cause

VINCENT FRIEL

Pursuer

against

DR IAN BROWN

Defender

Pursuer: Sutherland QC; Lefevre Litigation
Defender: McGregor; BTO Solicitors

22 March 2019

Introduction

[1] The pursuer was convicted by a jury on 17 February 2016 of offences under sections 1 and 1A of the Road Traffic Act 1988. The convictions relate to an accident which occurred on 18 January 2014. The pursuer was driving a car which struck two pedestrians within the confines of a pedestrian crossing, killing one and seriously injuring the other. At his trial he lodged a special defence of automatism, and led evidence in support of it.

[2] In this action the pursuer pleads that he suffered a vaso vagal attack and blacked out, and that he was in that condition when the accident occurred. He avers that this was brought on by a sudden or rapid fall in blood pressure and heart rate. He had for some time

before the accident been receiving medical treatment from the defender, his general practitioner, for hypertension, including the prescription of an antihypertensive medication, Losartan. On 14 November 2013 the defender decided to add a second antihypertensive drug to the pursuer's regime, namely Tildiem. The pursuer attributes his loss of consciousness on 18 January 2014 to the combination of medications he was prescribed, and in particular the addition of Tildiem. He pleads that the rapid fall in his blood pressure was caused or materially contributed to by the addition of Tildiem to his regime.

[3] The pursuer alleges that the defender was negligent in prescribing Tildiem, and in failing to provide the pursuer with information about the risks of using it, and using it in combination with other drugs.

[4] He seeks reparation from the defender for psychological injury he sustained as a result of the accident. He also seeks the cost incurred in instructing his defence, for which he required to pay privately. He claims wage loss, both in respect of the period he spent in prison and more generally.

[5] The defender has two preliminary pleas. The first is a plea to the relevancy and specification of the action. It was advanced on the basis that the pleadings disclosed that the action was an abuse of process. The defender pled that the action was an abuse of process, in Answer 10. Mr McGregor doubted whether it was strictly necessary to advance a plea in law to seek the dismissal of an action as an abuse of process. The second plea was based on the maxim or brocard *ex turpi causa non oritur actio*. Although Mr McGregor initially advanced both of those pleas, he conceded that the second should be reserved for discussion at a proof before answer if he were to be unsuccessful in having the action dismissed on the basis of the first. I am concerned, therefore, only with whether the action falls to be dismissed because it is an abuse of process.

[6] It is admitted by virtue of there having been no response to the defender's notice to admit, that the pursuer lodged a special defence of automatism at his trial; that he led evidence in support of that special defence; and that the jury rejected the special defence. The terms of the special defence are not averred in the pleadings or set out in the notice to admit. A copy of the special defence was produced as an appendix to the pursuer's note of argument number 23 of process, and parties agreed that I should proceed on the basis that it is undisputed that the special defence was in these terms:

> "… if the offences libelled in the charges on the indictment were committed, and if committed by him, he was in a state of unconsciousness at the time of the alleged offence as a result of a medical condition which manifested itself by a fall in blood pressure and a consequent profound faint reaction, namely a vasovagal attack, which condition was not knowingly self-induced, was not foreseeable to the accused and resulted in total alienation of reason amounting to total loss of control of actions."

Summary of submissions

[7] The proposition for the defender was this. In order to succeed in proving his case against the defender, the pursuer would have to prove that he suffered a vasovagal attack. A finding that he did would undermine the verdict of the jury convicting him. The jury must, standing the terms of the special defence before them, have rejected the proposition that he suffered such an attack, and been satisfied beyond reasonable doubt that he did not suffer such an attack. To permit the pursuer to advance the case pled would therefore amount to a collateral attack on his conviction. Such collateral attacks are contrary to public policy and therefore an abuse of the processes of the court: *Hunter* v *Chief Constable of the West Midlands Police* [1982] AC 529, pages 541B-C; 541H-542D. The attack on the conviction need not be the sole or dominant purpose of the proceedings: the action should be dismissed.

[8] There was no Scottish case in which that course had been followed in similar circumstances, or in which such a collateral attack had been found to be an abuse of process. All the relevant authorities came from the courts of England and Wales or the Privy Council: *Hunter*; *Hurnam* v *Bholah* [2010] UKPC 12; *Kamoka* v *Security Service* [2017] EWCA Civ 1665; *Amin* v *Director General of the Security Service* [2015] EWCA Civ 653. The Scottish case touching most directly upon the matter was *Wright* v *Paton Farrell* 2006 SC 404, in which certain observations about abuse of process, and about the decision in *Hunter*, had been made. The law regarding the inherent power of the Court had developed significantly since those observations were made: *Tonner* v *Reiach and Hall (A Firm)* 2008 SC 1. That there was no rule of court providing a procedure for dismissal in respect of an abuse of process of the sort alleged was no bar to my dismissing the action.

[9] Mr McGregor accepted this was not a case in which the only or dominant purpose of the present proceedings was to attack the conviction. He did not suggest that the pursuer was not genuinely seeking to recover damages from his general practitioner on the basis of alleged clinical negligence.

[10] Ms Sutherland did not accept that *Hunter* represented the law of Scotland. Her submission, however, focused on section 10(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 ("the 1968 Act"). Section 10(1) and (2) provide, so far as is material:

> "10 (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom … shall … be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom … —
>
> (a) he shall be taken to have committed that offence unless the contrary is proved."

[11] Ms Sutherland submitted that the pursuer was doing no more than section 10(2)(a) entitled him to do, namely seeking to prove that he had not committed the offence of which he had been convicted. If he was entitled to do so by virtue of a statutory provision, that could not possibly be an abuse of process: *CXX* v *DXX* [2012] EWHC 1535 (QB), paragraph 34. The defender sought to rely on the conviction in the proceedings, and the pursuer therefore had the benefit of section 10(2)(a). There was nothing in the statutory language to suggest that only a defender could benefit from its terms by being entitled to lead evidence to prove that he did not commit an offence of which he had been convicted. She submitted that a majority finding of guilty – as in the pursuer's case – might carry less weight than a unanimous finding: *Cronie* v *Messenger and another*, (unreported) Temporary Judge CJ MacAulay QC, 25 June 2004, paragraph 26.

[12] Counsel did not raise any issue as to whether the plea in law advanced was one apt to encompass the issue of abuse of process. She did not dispute that the Court could, in the exercise of its inherent jurisdiction, dismiss an action as an abuse of process. She did, however, submit that the power to dismiss an action summarily for abuse of process was a draconian one which must be exercised with great caution, and only as a last resort: *Grubb* v *Finlay* 2018 SLT 463, at paragraphs 34-36.

[13] Ms Sutherland also sought to persuade me that the matter at issue in the present action was whether the pursuer had suffered a vasovagal attack as a result of a prescribing error by the defender. The allegation of a prescribing error was not something that had been

before the jury in the criminal trial. The pleadings, at page 21E of the Closed Record, in response to the allegation that the action constituted an abuse of process, were:

> "The issues against the current defender are different from the issues relevant to the trial. The pursuer did not cause harm to the defender. The allegations against the current defender relate to misprescribing and a failure to inform which are entirely different from the issues at the trial."

[14] Mr McGregor made a number of submissions about section 10(2). He recognised that there was on the face of matters some potential tension between its terms and the notion that an attempt to lead evidence to rebut the presumption that the offence had been committed was contrary to public policy and an abuse of process. He drew attention to passages in the speech of Lord Diplock in *Hunter* at pages 543-544. The statute contained nothing to limit the right to found on a conviction as raising a presumption that the offence had been committed to a pursuer, or the right to lead evidence in rebuttal to a defender. It did not appear, however, that the statute had been intended to permit a pursuer at his own hand to bring proceedings which involved a collateral challenge to his conviction.

[15] When he came to make submissions in response to those of Ms Sutherland, he submitted that on a proper analysis the defender was not founding on the conviction in the way contemplated by the statute. The defender was not seeking to establish, at least so far as the submission based on abuse of process was concerned, on a proposition that the offence had been committed. All that was material for that purpose of his first plea in law was that there was a conviction. If that plea in law were rejected, and the court came to consider his second, after proof, the situation would be different, because whether the second plea in law could be successfully invoked would depend on the extent of the pursuer's responsibility and culpability. As the defender was not invoking section 10(1) in relation to his first plea in law, there was no room for the pursuer to invoke section 10(2)(a).

[16] In the course of the debate I raised with parties the question of the mischief that the 1968 Act was intended to address, given that there was a dispute between them as to whether it should be construed as permitting the pursuer to bring the present action. Sections 10 and 12 of it are in practically identical terms to sections 11 and 13 of the Civil Evidence Act 1968, which came to be enacted following recommendations made in the Fifteenth Report of the Law Reform Committee (Cmnd 3391), presented to Parliament in September 1967. Those are summarised in the annotations to the Civil Evidence Act in the Current Law Statutes which were discussed in the course of the hearing. Parties lodged further written submissions about the report.

The law

Abuse of process

[17] As I have indicated, none of the cases supporting the proposition that a collateral attack in civil proceedings on a conviction is an abuse of process was decided by a Scottish court. The first appears to have been *Hunter*. Mr Hunter was one of the six men convicted of murders committed by means of detonating bombs in two pubs in Birmingham in 1974 (the Birmingham Six). He claimed damages from the police for assaulting him. Evidence of confessions was essential to the Crown case. In the course of the earlier criminal proceedings there had been an objection to the admissibility of evidence of confessions, on the basis that the confessions had been obtained by the police inflicting violence on Mr Hunter and his co-accused. Following a trial within a trial, the trial judge ruled that the confessions were admissible. He found that the evidence of the police established beyond reasonable doubt that there had been no physical violence by the police to the accused, and that each of the accused in claiming that there had been, had committed perjury (*Hunter*,

page 538F-G). The allegations were repeated in evidence heard by the jury as relevant to the weight to be attached to the confessions. Mr Hunter appealed against conviction, unsuccessfully, but did not challenge the finding of the judge as to admissibility or his directions to the jury regarding the evidence in question. The violence founded on by him in the criminal trial was the same violence towards him by the police alleged in the civil proceedings. As is notorious, further criminal appeals followed after the decision in the civil proceedings. The ultimate outcome is reported in *R* v *McIlkenny (Richard)* (1991) 93 Cr App R 287.

[18] The House of Lords struck out Mr Hunter's claim against the police as an abuse of process. Lord Diplock gave the only substantive speech, which includes the following passages at pages 541 and 542:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.
>
> The proper method of attacking the decision by Bridge J in the murder trial that Hunter was not assaulted by the police before his oral confession was obtained would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous a ground of his appeal against his conviction to the Criminal Division of the Court of Appeal. This Hunter did not do. Had he or any of his fellow murderers done so, application could have been made on that appeal to tender to the court as 'fresh evidence' all material upon which Hunter would now seek to rely in his civil action against the police for damages for assault, if it were allowed to continue. But since, quite apart from the tenuous character of such evidence, it is not now seriously disputed that it was available to the defendants at the time of the murder trial itself and could have been adduced then had those who were acting for him or any of the other Birmingham Bombers at the trial thought that to do so would help their case, any application for its admission on the appeal to the Court of Appeal (Criminal Division) would have been doomed to failure.
>
> It would call for a degree of credulity too extreme to be expected even from judicial members of your Lordships' House to fail to recognise that the dominant purpose of this action, and the parallel actions brought by the other Birmingham Bombers so far

as they are brought against the police, has not been to recover damages but is brought in an endeavour to establish, long after the event when memories have faded and witnesses other than the Birmingham Bombers themselves may be difficult to trace, that the confessions on the evidence on which they were convicted were induced by police violence, with a view to putting pressure on the Home Secretary to release them from the life sentences that they are otherwise likely to continue to serve for many years to come.

…

My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A L Smith LJ in *Stephenson* v *Garnett* [1898] 1 QB 677, 680-681 and the speech of Lord Halsbury LC in *Reichel* v *Magrath* (1889) 14 App Cas 665 , 668 which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A L Smith LJ:

> '... the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court.'

The passage from Lord Halsbury's speech deserves repetition here in full:

> '... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'

In the instant case the relevant final decision by a competent court in which the identical question sought to be raised has been already decided is the ruling of Bridge J, on the voir dire in the murder trial, that Hunter's confession was admissible. Initially his ruling may have been provisional in the limited sense that up to the time that the jury brought in their verdict he had power to reconsider it in the light of any further evidence that might emerge when the whole question of the circumstances in which the confession was obtained was gone into again before the jury on the question of the weight to be attached to it: *Reg* v *Watson (Campbell)* [1980] 1 WLR 991. But his ruling became final when the trial ended with the return of the jury's verdict of guilty and the pronouncement by the judge of the mandatory sentence of life imprisonment. Bridge J thereupon became functus officio. His ruling that the confession was not obtained by the use of violence by the police, as Hunter had alleged, could thereafter only be upset upon appeal to the Court of Appeal (Criminal Division)."

[19] The decision in *Hunter* has been followed and applied on a number of occasions. In *Hurnam* the Privy Council considered that the initiation of a civil action was comparable to that of the action in *Hunter* and struck it out. The appellant, a former barrister, was convicted of conspiring to hinder a police inquiry by fabricating an alibi for a former client. He raised civil proceedings for damages against the former client and the client's brother, alleging that they had made false and malicious allegations against him, and that he had suffered loss and damage as a result. The Board took the view that the real purpose of the action was not to obtain damages, but to rehabilitate his reputation and reopen the criminal proceedings: paragraph 31. A factor informing that view was the circumstance that there was no real prospect of recovering damages from either of the defendants.

[20] The scope of abuse of process in the law of England and Wales on the basis of collateral attack on an earlier decision appears to extend beyond challenges to criminal convictions. It is not limited to collateral attacks on criminal convictions, but applies in a variety of other situations. The attempt to invoke it (successful at first instance, but reversed on appeal) in *Kamoka* was in relation to civil claims alleging unlawful detention and unlawful restriction of liberty by Control Orders. They involved allegations of suppression of evidence in proceedings in the Special Immigration Appeals Commission and in other proceedings relative to the Control Orders. Some of the findings in the earlier proceedings were open, but others were closed, and based on evidence adduced in closed proceedings. In *Kamoka* Flaux LJ carries out an extensive review of relevant authority at paragraphs 42 and following. It is apparent that the doctrine of abuse of process can sometimes apply where all the proceedings in question are civil proceedings. It encompasses some situations which in Scotland would probably be dealt with by a plea of "competent and omitted": *Kamoka*, paragraph 47. Flaux LJ summarises matters in this way at paragraph 42:

> "The power of the courts to strike out proceedings for abuse of process has developed in parallel with issue estoppel and *res judicata* (often but not invariably to be deployed when issue estoppel and/or *res judicata* are not applicable) essentially to protect two interests: "the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated": per Simon LJ in *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3; [2017] 1 Lloyd's Rep 136 at [48(1)]."

In a similar vein, he refers at paragraph 46 to Lord Hoffman's explanation of the policies that underlie discouragement of relitigation of disputes in *Arthur JS Hall & Co* v *Simons* [2002] 1 AC 615, at page 701A-C.

[21] It appears also that different views have been taken in different cases as to whether the doctrine may be invoked where the claim is a sham, and not honest or bona fide: see paragraph 57, contrasting the approach of Stephenson LJ in *Bragg* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 with that of Stuart-Smith LJ in *Ashmore* v *British Coal Corporation* [1990] 2 QB 338 at page 352D-F; see also *Amin*, Moore-Bick LJ at paragraphs 13 and 14, citing *Smith* v *Linskills* [1996] 1 WLR 763.

> "13. … In *Smith v Linskills* … the claimant, who had been convicted of an offence of aggravated burglary, brought proceedings against his solicitors seeking damages on the grounds that their negligent preparation of his defence had resulted in his conviction. As in the present case, the claimant contended that the issues raised by his claim were different from those that arose at his trial, but that did not prevent the proceedings from constituting an abuse of process. Sir Thomas Bingham MR giving the judgment of the court said at page 768H:
>
> > "M. Andrew Nicol, for Mr Smith, argues that the issue in the present proceedings is not the same issue as was decided in the Crown Court. To an extent this is so. In the Crown Court the question was whether, applying the criminal standard of proof, Mr Smith was shown to have committed the crime with which he was charged. In the present proceedings the issue is whether his former solicitor handled his defence negligently. It is, however, plain that the thrust of his case in these proceedings is that if his criminal defence had been handled with proper care he would not, and should not, have been convicted. Thus the soundness or otherwise of his criminal conviction is an issue at the heart of these proceedings. Were he to recover substantial damages, it could only be on the basis that he should not have been convicted. Even if he were to establish negligence, he could recover no more than nominal damages at best if the court were to conclude that even if

> his case had been handled with proper care he would still have been convicted. It follows, in our judgment, that these proceedings do involve a collateral attack upon the decision of the Crown Court. We understand Lord Diplock, by "collateral," to have meant an attack not made in the proceedings which gave rise to the decision which it is sought to impugn; not, in other words, an attack made by way of appeal in the earlier proceedings themselves."

14. As to the claimant's motive for bringing the proceedings, Sir Thomas said at page 771D:

> "The rule with which we are here concerned rests on public policy. The basis of that public policy, further considered below, is the undesirable effect of relitigating issues such as this. We cannot see how those undesirable effects are mitigated by the motive of the intending plaintiff to recover damages rather than simply to establish the unsoundness of the earlier decision.""

[22] The high point of the defender's submission, so far as the recognition of *Hunter* abuse of process in Scots law is concerned, was *Wright* v *Paton Farrell*. It concerned an action of damages against solicitors alleging negligence in the conduct of a criminal trial. The criminal conviction had already been quashed on the basis of defective representation. The action was dismissed because the averments as to causation were inadequate. The defenders had, however, sought dismissal also on the grounds that the solicitor was immune from suit. In that connection the Lord President (Hamilton) made the following observations:

> "17. There is, in my view, a strong public interest in the soundness of subsisting criminal convictions not being capable of challenge, directly or indirectly, otherwise than by the processes of appeal or review set down by Parliament or recognised by well-established criminal procedure…
>
> 18. As Lord Hope observed in *Hall* (p715) public confidence in the administration of justice "is likely to be shaken if a judge in a civil action were able to hold that a person whose conviction has been upheld on appeal would not have been convicted but for his advocate's negligence." A similar effect on public confidence is likely where no appeal is taken or where leave to appeal has been refused.
>
> 19. Reference was made in the course of the discussion to sec 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (cap 70) which, by subsec (1) makes, for certain purposes, a subsisting criminal conviction admissible in civil proceedings. By subsec (2) it is provided that in the civil proceedings: '(a) he [the

person against whom a conviction subsists] shall be taken to have committed that offence unless the contrary is proved'. The object of sec 10 is to allow any pertinent conviction to be used for a purpose relevant to an issue in the civil proceedings but with a right to the civil party against whom the conviction is sought to be used to prove that he did not commit the offence in question. The section is most commonly invoked in actions of damages for personal injuries where the defender has been convicted in summary proceedings of a road traffic offence or of an offence related to health or safety at work. The soundness of the convictions in such cases are, in my experience, rarely challenged. The object of the exception is to afford, by way of defence, a means of rebutting the implication of relevant fault which might otherwise be drawn from the conviction. While a finding in the civil proceedings that the party convicted had not committed the offence in question might well raise a doubt as to the soundness of the conviction, it has never, so far as I am aware, been suggested that this provision made by Parliament is, given its scope and purpose, likely to shake general public confidence in the administration of criminal justice.

20. The same cannot, in my view, be said for collateral challenges arising from civil actions for reparation by convicted persons. While a direct challenge in civil proceedings to a criminal conviction could be answered by a plea to the competency (*Moore v Secretary of State for Scotland*), an indirect challenge by way of an action of damages against the legal representative who conducted the trial would be less easy to deal with. It might well be difficult to distinguish, on the face of the pleadings, bona fide claims for damages for professional negligence from covert attempts by convicted persons to put in doubt their convictions. *Hunter v Chief Constable, West Midlands Police* has no direct application in Scotland; in any event, it appears to have proceeded on a view as to the underlying purpose of that litigation which in most cases might not be as readily capable of divination. While there are indications that the law of Scotland may be developing a principle of 'abuse of process', I doubt whether it would be possible readily to identify and, under current procedural arrangements, to deal with cases falling within any such category. As Lord Osborne observes, the views of the majority in *Hall* appear to have been strongly influenced by the existence of well-developed procedural arrangements in England and Wales which have currently no equivalent in Scotland.

21. It is said, however, that whatever merits there may be generally in a concern about collateral challenge to criminal convictions, that concern can have no relevance where, by due criminal process, any such conviction has been set aside, as in the present case. There is force in that point. If heading (3) [relitigation or collateral challenge] were the only consideration in favour of retaining an immunity, there would, in my view, be a strong argument for restricting that immunity to cases where there was, at the relevant time, a subsisting conviction."

[23] The law relating to the inherent power of the Court has developed since then. A specific procedural provision providing that an action might be struck out for want of prosecution is not required for a Scottish court to exercise its inherent power to strike it out

on that ground: *Tonner*. It is well established that the court can exercise its inherent jurisdiction in the case of an abuse of process by way of a procedural sanction such as dismissal: *Moore* v *Scottish Daily Record and Sunday Mail Ltd* 2009 SC 178, Lord Justice Clerk (Gill), paragraph 14.

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1968

[24] The provisions of sections 10 and 12 of the 1968 Act are virtually identical to those of sections 11 and 13 of the Civil Evidence Act 1968. Those latter provisions resulted from recommendations made in the fifteenth Report of the Law Reform Committee (Cmnd 3391). The subject of that report was "The Rule in Hollington v Hewthorn". This was a reference to *Hollington* v *F Hewthorn and Co Ltd* [1943] KB 587. The case involved damage sustained to the plaintiff's car in an accident. The plaintiff sued the driver of the other car. The driver of the plaintiff's car died before the case was heard. He had been the plaintiff's only witness. The plaintiff tried to lead evidence of the defendant's driver's conviction as prima facie evidence of negligence. It was held to be inadmissible. The decision was widely criticised, and regarded by some as wrongly decided: see eg *Goody* v *Odhams Press* [1967] 1 QB 333, Lord Denning MR at page 339F-G; *Hunter*, Lord Diplock, page 643D-E. It was thought to be wrong that a decision in criminal proceedings should have no probative value where proof of the same conduct was required in civil proceedings.

[25] The application of the rule in defamation proceedings had also given rise to concern. A defendant could not rely on a conviction as proving that the plaintiff had in fact committed the crime of which he had been convicted, but was restricted to a plea of partial justification: *Goody;* see also *Hinds v Sparks* (1964) The Times, July 28, 30. It was against the background of these concerns that the Law Reform Committee made its recommendations.

[26] The question of public policy about relitigation of issues was considered by the Law Reform Committee. The following passages from its report explain why the recommendations differed as between actions for defamation and other types of civil action:

> "26. As will have been apparent, our general recommendations as to the admissibility of evidence in civil proceedings of convictions in previous criminal proceedings and the weight to be given to such convictions, and as to the non-admissibility of acquittals, have been based solely upon consideration of their respective probative values. But, as some recent cases have shown, the rule in *Hollington v Hewthorn* can have practical consequences which raise a wider question of public policy to which our general recommendations may not provide a sufficient answer. The rule makes it possible in some circumstances to obtain what is in effect a re-trial of criminal proceedings in the guise of a civil action for defamation brought by the person who has been convicted or acquitted in the criminal proceedings. …
>
> 27. … In actions, other than those for defamation, to which our general recommendations apply, the materiality of the conviction is not to prove that the convicted person was guilty of the criminal offence of which he was convicted, but to prove that his conduct was such as to give rise to a civil liability on the part either of the convicted person himself or of another person such as his employer or an insurer. Because this liability is additional to the penal consequences of the conviction and may fall upon someone other than the convicted person, we have come to the conclusion, on balance, that the person upon whom the civil liability will fall should not be precluded from resisting it by proving, if he can, that the convicted person's conduct was not such as the criminal court found it to be. But in actions for defamation such as those which we have instanced, the only issue, other than that of damages, is whether a person who has been tried for a criminal offence was guilty of that criminal offence. The real purpose of the action in the case of a conviction, or the defence of justification in the case of an acquittal, is to obtain a re-trial of the criminal proceedings in the case upon different evidence by a court which lacks jurisdiction to try crime and applies a procedure and standard of proof which the law regards as inappropriate in criminal proceedings.
>
> 28. This raises two related questions of public policy which do not depend upon the probative value of convictions and acquittals. The first is whether or not a civil court, in an action to which the Crown is not a party, ought to re-try upon a different standard of proof the precise issue of guilt of a criminal offence which has already been tried and determined by a criminal court of competent jurisdiction. The second is whether any person ought to be at risk of incurring civil liability for stating that another person was guilty of an offence of which he was convicted, so long as such conviction has not been set aside upon appeal, or ought ever to be entitled without incurring civil liability to state that another person was guilty of an offence for which he had been duly tried and acquitted.

> 29. We think that the answer to both these questions is 'No'. The state, nominally the Crown, has a direct interest in all prosecutions for criminal offences. It has established a special system of trial and appellate courts for dealing with them. These courts apply a procedure different from that in civil actions and adopt a different standard of proof, the purpose of which is to safeguard the interests of the accused and to ensure that the innocent are not convicted. The penal sanctions which the criminal courts impose upon those whom they find guilty are enforced by the executive power of the state. No civil court has jurisdiction to alter or affect them. Those whom they acquit cannot be put on trial again. Their acquittal is final. It can only undermine public confidence in the administration of criminal justice if civil courts in actions between private individuals can be forced to re-try the issue of guilt which has already been determined by a criminal court and reach a different conclusion. To a trained lawyer it is no doubt intelligible that a civil court should reach a different conclusion from that of the criminal court without there having been any error in the finding of the criminal court. The re-trial in the civil action may take place many years later, when the witnesses, upon whose evidence the finding of guilty or not guilty at the criminal trial was based, have died or disappeared or forgotten what happened. Legal aid is not available in actions for defamation and one or other of the parties may lack the resources to trace witnesses and documents and marshall all the relevant evidence. In any event, the onus of proof will be different from that which the law regards as essential in a criminal trial. But this is much too technical for the layman. His reaction cannot fail to be: here are two English courts, one says that A was guilty, the other says that he was not; one of them must be wrong. And the law is made for laymen. It is on their behalf as citizens of the state that criminal prosecutions are brought. When such a prosecution brought in a court of competent jurisdiction results in a conviction which is not set aside upon appeal, any citizen should, we think, be entitled to say without risk of incurring any civil liability that the convicted person did commit the offence of which he was convicted. And, by parity of reasoning, when a prosecution results in an acquittal, we do not think that he is entitled to say that the acquitted person did commit the offence of which he was acquitted. In reaching this conclusion we have not overlooked the argument that there may be exceptional cases in which the public interest could be served by the Press, or a private citizen, being free to challenge the correctness of an acquittal, and that our recommendation could be criticised as tending to restrict freedom of discussion. But we think that, on balance, the greater public interest lies in inhibiting attempts to use defamation actions as a means of challenging the findings of criminal courts."

[27] It seems that the Law Reform Committee did not envisage reliance on a conviction other than by a party other than the convicted person, seeking to establish liability against the convicted person or someone liable for his acts or omissions. The convicted person, or someone else liable for his acts and omissions, would be at risk of incurring an additional liability and ought to be able to avoid it. The public policy considerations were different

where defamation actions were concerned. These were that the real purpose of the action was to retry the criminal case and the confusion that might be produced in the minds of the public. The Committee recommended that convictions should be conclusive evidence of guilt in defamation proceedings, and that acquittals should be conclusive as to innocence. The first of these recommendations, but not the second, featured in the legislation (section 12 of the 1968 Act and section 13 of the Civil Evidence Act). It also appears that the Law Reform Committee was not considering the possibility of collateral attacks on criminal convictions by persons initiating actions, other than in the context of defamation actions. The law of abuse of process, as explained in *Hunter*, appears then to have developed to deal with such collateral attacks in proceedings other than defamation cases. No issue of abuse of process was raised in *Goody*. Had there been a developed doctrine of that sort the questions for the Law Reform Committee would have been rather different.

[28] An argument very similar to that advanced by Ms Sutherland in this case was advanced in *Hunter*. The arguments are recorded in the following way in the report at pages 534G-535B. Lord Diplock dealt with this argument in the following way, at pages 543-544. His reasoning is consistent with the approach taken by the Law Reform Committee:

> "The occasion for the reference of the decision in *Hollington v Hewthorn* that evidence of criminal convictions was not admissible in civil actions to the Lord Chancellor's Law Reform Committee was a notorious libel case in which despite a defence of justification a criminal who had been convicted of serious offences was awarded damages by a jury in a civil action against a newspaper for stating that he had committed the identical offences of which he had been found guilty upon his trial. So here, unlike the case of *Hollington v Hewthorn*, the civil action did raise the identical question that had already been decided against the plaintiff by a competent court; yet under the rule in *Hollington v Hewthorn* even the fact of his conviction was inadmissible in evidence on the plea of justification in the civil action. This is the mischief, in the initiation of civil proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been reached by a competent court of criminal jurisdiction, that section 13

of the Act of 1968 was designed to cure. It is to be observed that it makes the conviction not merely prima facie evidence of the plaintiff's guilt but conclusive evidence. The provisions of section 13 are thus consistent with and give statutory recognition to the public policy of prohibiting the use of civil actions to initiate a collateral attack on a final decision against the intending plaintiff which has been made by a criminal court of competent jurisdiction.

Section 13 is to be contrasted with section 11. Although section 11 is not in express terms confined to convictions of *defendants* to civil actions or persons for whose tortious acts defendants are vicariously liable, this must in practice inevitably be the case. It is the plaintiff who will want to rely upon a conviction of the defendant or a person for whose tortious acts he is vicariously liable, for a criminal offence which also constitutes the tort for which the plaintiff sues. It is scarcely possible to conceive of a civil action in which a plaintiff could assist his cause by relying upon his own conviction for a criminal offence. So section 11 is not dealing with the use of civil actions by plaintiffs to initiate collateral attacks upon final decisions against them which have been made by a criminal court of competent jurisdiction; and the public policy that treats the use of civil actions for this purpose as an abuse of the process of the court is not involved.

Section 11 makes the conviction prima facie evidence that the person convicted did commit the offence of which he was found guilty; but does not make it conclusive evidence; the defendant is permitted by the statute to prove the contrary if he can. The section covers a wide variety of circumstances; the relevant conviction may be of someone who has not been made a defendant to the civil action and the actual defendant may have had no opportunity of determining what evidence should be called on the occasion of the criminal trial; the conviction, particularly of a traffic offence, may have been entered upon a plea of guilty accompanied by a written explanation in mitigation; fresh evidence, not called on the occasion of his conviction, may have been obtained by the defendant's insurers who were not responsible for the conduct of his defence in the criminal trial, or may only have become available to the defendant himself since the criminal trial. This wide variety of circumstances in which section 11 may be applicable includes some in which justice would require that no fetters should be imposed upon the means by which a defendant may rebut the statutory presumption that a person committed the offence of which he has been convicted by a court of competent jurisdiction. In particular I respectfully find myself unable to agree with Lord Denning M.R. that the only way in which a defendant can do so is by showing that the conviction was obtained by fraud or collusion, or by adducing fresh evidence (which he could not have obtained by reasonable diligence before) which is conclusive of his innocence. The burden of proof of 'the contrary' that lies upon a defendant under section 11 is the ordinary burden in a civil action: proof on a balance of probabilities; although in the face of a conviction after a full hearing this is likely to be an uphill task."

[29] Section 10 and its English equivalent have been the subject of judicial consideration on a number of occasions since then. Courts have not discerned any threat to public

confidence in the administration of justice arising from its operation. Paragraph 19 of the Opinion of the Lord President in *Wright* is quoted above. Similarly, in *Towers* v *Flaws and another* [2015] CSIH, at paragraph 28, the Lord Justice Clerk said:

> "There is no question of challenging a criminal conviction. That conviction stands. If the civil jury determine on the evidence before them that the defender has demonstrated that he was not negligent, that will be a matter entirely for them. There is no difficulty in this. The evidential basis of the conviction will remain undisturbed and no problem of undermining public confidence or uncertainty will arise."

In *Hall-Craggs and others* v *The Royal Highland Show and Agricultural Society of Scotland and another* [2016] CSOH 8 Lady Wolffe at paragraph 19 again emphasised a distinction between the operation of section 10 and a challenge to the correctness of a conviction:

> "… the convicted party may endeavour to show that they did not commit the offence which is the subject-matter of the conviction. (That is *not* the same as showing that they were wrongly convicted, and that is why, in my view, the Inner House in *Towers* held as irrelevant averments which had that as their object.)"

Discussion

[30] I am satisfied that the present action does raise an issue that was determined adversely to the pursuer in the criminal proceedings. He pleads that he suffered a vasovagal attack, and that he suffered a brief period of loss of consciousness, and that this was brought on by a sudden or rapid fall in blood pressure or heart rate. Loss of consciousness as a result of a vasovagal attack was before the jury in the special defence. In order to succeed in the present action, the pursuer will have to prove not only that he suffered a vasovagal attack resulting from a fall in blood pressure, but also that it was caused by medication negligently prescribed. No fall in heart rate was mentioned in the special defence, but Ms Sutherland did not suggest that this was of any significance.

[31] It seems to me that the jury must have rejected the proposition that the pursuer suffered a vasovagal attack, and became unconscious, as a result of a fall in blood pressure. On the terms of the special defence it is theoretically possible that jury could have been satisfied that, or in reasonable doubt as to whether, the pursuer had a vasovagal attack, but been satisfied beyond reasonable doubt that any such attack was self-induced or foreseeable. There was, however, nothing in the pleadings to suggest that that would have been a live issue on the evidence in the trial, and Ms Sutherland did not submit that it would have been. Comparing the pursuer's pleadings with the terms of the special defence rejected by the jury, I conclude that the pursuer's offer to prove the averments at page 15A-B and 15E-16A runs counter to the basis on which he was convicted. It is therefore a collateral challenge. I adopt the definition of collateral used by the Court of Appeal in *Smith* v *Linskills*: an attack not made in the proceedings which gave rise to the decision which it is sought to impugn; not, in other words, an attack made by way of appeal in the earlier proceedings themselves.

[32] If there is an abuse of process of a type prohibited by Scots law apparent from the face of the pleadings or the procedural history of the action, it is in my opinion competent for the court to deal with that by way of dismissal, in the absence of a rule of procedure specifically dealing with it. That is clear from *Tonner*. I accept that summary dismissal of an action is a power of last resort. The considerations mentioned in *Grubb* v *Findlay* are not of direct application here, in the sense that the issue of abuse of process has been raised and answered in the pleadings, and a debate with notice properly given that dismissal would be sought on that basis. In *Grubb* the suggestion was that the Lord Ordinary ought to have dismissed an action summarily during or at the end of the proof, and on an entirely different basis.

[33] It is apparent that the observations in *Wright* favouring the retention of immunity of suit for advocates in criminal proceedings were influenced by the absence of procedural mechanisms in Scottish civil procedure which could readily be used to strike out collateral challenges to subsisting criminal convictions brought in actions for professional negligence against advocates. Lord Osborne was of the view that the inherent power of the Court of Session which he described as never having been defined or operated, was not comparable with the powers to strike out described by Lord Hoffman in *Hall*. The objection was not so much to the notion that there might be public policy objections to a pursuer raising issues that bear on the soundness of a conviction in an action at his own instance, as to the absence of a procedural mechanism for dealing with them. The Lord President appears also to have been proceeding on the basis that challenging the conviction must be the sole or dominant purpose of the action, and that it might be difficult to discern whether or not that was the case. I approach the observations in *Wright* bearing in mind that the absence of a procedural rule to deal with cases of abuse of process informed the approach of the Court, and also bearing in mind the later decision in *Tonner*.

[34] I have no doubt that Scots law recognises and seeks to give effect to the policies expressed in the maxims *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*, referred to by Lord Hoffman in *Hall* at page 701A-C. These are, as Flaux LJ explained in *Kamoka*, the interest of the individual in not being vexed twice in relation to the same cause, and the public interest in the finality of litigation. The Lord President recognised in *Wright* the public interest in avoiding the risk that public confidence in the administration of criminal justice might be undermined by findings in a civil case brought by the convicted person. He did, however, state in terms that *Hunter* had no direct

application in Scotland, and proceed upon an understanding that the underlying purpose of the litigation was of significance in the context of *Hunter*.

[35] What underlies the idea that a collateral challenge to a conviction is an abuse of process is the public interest in preventing the relitigation of issues that have already been tried. That interest is particularly powerful when the result of the earlier proceedings has been a criminal conviction. Additional considerations apply. It may well cause a loss of confidence in the administration of criminal justice if there is a public perception that there are means available to a convicted person, at his own instance, to challenge a conviction other than by appeal. Notwithstanding the reservations expressed in *Wright*, I am satisfied that Scots law recognises that it is contrary to public policy to allow a civil action to proceed in which the pursuer mounts a collateral challenge to his conviction. I am also satisfied that this is not confined to cases in which that is the sole purpose of the action, for the reasons set out in the authority cited in *Amin* at paragraph 13 and 14. The ill-effects of the relitigation of the issue are in no way mitigated by the genuine intention of the pursuer to obtain damages. It may be impossible to tell what the pursuer's intention is.

[36] I am therefore satisfied I should dismiss the action as an abuse of process. I am satisfied also that I have power to dismiss it on that basis. I am fortified in those conclusions by the comments, *obiter*, of the Lord Justice Clerk (Gill), Lord Clarke and Lord Menzies in *Clarke v Fennoscandia Ltd (No 3)* 2005 SLT 511, at paragraphs 17, 40 and 44. Each of their Lordships was of the view that the court had an inherent power to strike out a claim as an abuse of process specifically in the context of a proliferation of litigations about essentially the same issues. In *Clarke v Fennoscandia Ltd* 2008 SC(HL) 122 Lord Rodger, at paragraph 35, expressed the view that a Court of Session action in which a pursuer mounted a collateral attack on a decision of the Court of Appeal of England and Wales would not

have a legitimate purpose. All of those comments were referred to with approval by an Extra Division with apparent approval in *Lord Advocate v McNamara* 2009 SC 598, Lord Reed, delivering the opinion of the Court, at paragraph 7.

[37] I do not consider that the operation of section 10 of the 1968 Act assists the pursuer. The doctrine of abuse of process operates separately from, but consistently with, the rules of evidence provided in the 1968 Act, in the way described by Lord Diplock in *Hunter*. That doctrine as explained in *Hunter* operates to prevent a person from pursuing an action other than defamation proceedings in which there is a collateral challenge to a criminal conviction. Some of the same public policy considerations that informed the enactment of section 12 and its English equivalent also informed the decision in *Hunter*. The 1968 Act did not preclude collateral challenges, other than in the context of defamation actions. It does not follow, however, that such collateral challenges are permissible in other types of proceedings. It does not follow from the potential to rebut the presumption raised by a conviction (section 10(1) and (2)) that a pursuer may bring an action at his own instance to that end. I accept that there is some risk inherent in the operation of section 10 that the basis for a conviction will be undermined. It is one that appears to have been accepted because of the potential for liability to result from the operation of section 10(1). Parliament allowed for rebuttal in circumstances where the civil proceedings had the potential to render the convicted person (or someone else liable to make reparation for his acts or omissions and who had not been a party to the criminal proceedings) liable to pay money, because that was additional to the penal consequences of the conviction.

[38] In the context of section 10(2) it would be irrelevant for a defender to plead that his representation at trial had been defective or that he had been wrongly convicted for any other reason. It would, however, be relevant for him to seek to prove that he had not

committed the acts libelled in the indictment, so far as that was relevant to whether he was or was not negligent. That demonstrates that using section 10(2) involves no direct attack on a conviction. A civil court cannot, by virtue of section 10(2), be asked directly to find that a subsisting conviction is wrong: *Towers*; *Hall-Cragg*. A finding in fact that certain conduct central to the conviction had not occurred, however, could cast doubt on the soundness of the conviction, although it would not necessarily shake public confidence in the administration of criminal justice. That is what the Lord President said in *Wright* at paragraph 19.

[39] The only case of which I am aware in which a court has discussed the possibility that a defender might invoke section 10(1) or an equivalent provision against a pursuer was in *Hurnam*, at paragraph 41, where Lord Rodger said:

> "41. This leads on to the second point. In England at common law a conviction in a criminal court was of no evidential value in civil proceedings relating to the same matter: *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. In *Gorpatur v Kooshur* 1951 MR 31, having rejected the French rule, the Supreme Court held that the English law on this point applied in Mauritius. The law in England was amended by the Civil Evidence Act 1968 so that, by section 11, a conviction is now prima facie evidence that the person convicted did commit the offence of which he was found guilty. No equivalent amendment has been made in Mauritius. So the position remains that, in the present proceedings, for example, the defendants could not introduce evidence of Mr Hurnam's conviction as evidence that he had committed the offence of which he was convicted. That would be of some possible relevance in legitimate proceedings brought by Mr Hurnam against Kailash and Soobash. Here, however, except in relation to the two later statements of Soobash and the evidence of Mr Lowtoo, the issue raised by the State has nothing to do with the availability or admissibility of evidence in relation to the events in question. On the contrary, the contention is quite different: that the Board's duty is to strike out the action because its purpose is illegitimate and it constitutes an abuse of process. The rule in *Hollington v F Hewthorn & Co Ltd* does not affect that contention."

[40] For the reasons set out above, I am not convinced that the provisions allowing reliance on a conviction were intended to be invoked by defenders in the way discussed (at

least hypothetically) by Lord Rodger. On his analysis also, however, it is plain that the availability to the claimant, or the admissibility, of evidence to show that he has not committed an offence does not prevent a court from regarding his action as an abuse of process. That is consistent with the approach I have taken, which is that the law regarding abuse of process operates separately from the rules of evidence provided in the statutes of 1968.

Disposal

[41] The plea advanced by the defender was one to the relevancy and specification of the action. Whether an action which is an abuse of process is irrelevant was not discussed. A case is irrelevant when, if the party were to succeed in proving all his averments, he would nevertheless fail to make out his case. I do not think that a collateral challenge to a conviction which is contrary to public policy renders an action irrelevant in that sense. It may be that an action which does not have a legitimate purpose is incompetent: *Clarke* v *Fennoscandia*, Lord Rodger, paragraph 35. As I have said, I am satisfied that it is within the inherent power of the Court to dismiss an action as an abuse of process. That being so, I consider that the absence of a plea in law specifically mentioning abuse of process does not prevent me from dismissing the action on that basis. Where a point of this sort is to be advanced by a party, that party should give notice of the point so it can be fully and properly argued. That has been done in this case in the body of the pleadings and in the note of arguments. I therefore dismiss the action on the basis that it is an abuse of process, although I am not sustaining the defender's first plea in law.